No. 87-131

In the

Supreme Court of the United States

October Term, 1987

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

SIERRA CLUB,

Petitioner,

v.

SHELL OIL,

Respondent.

SIERRA CLUB,

Petitioner,

v.

MONOCHEM, INC.,

Respondent.

SIERRA CLUB,

Petitioner,

v.

COPOLYMER RUBBER AND CHEMICAL CORP., et al.,

Respondent.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frank S. Craig, III*
BREAZEALE, SACHSE & WILSON
Post Office Box 3197
Baton Rouge, LA 70821
(504) 387-4000
Counsel for Allied Corporation, Bercen, Inc. and Formosa Plastics Corporation, Louisiana, Inc.

Robert S. Taylor*
SWIDLER & BERLIN, Chartered
3000 K St. NW, Suite 300
Washington, DC 20007
(202) 944-4320
Counsel for Allied Corporation

Tom F. Phillips*
TAYLOR, PORTER, BROOKS & PHILLIPS
Post Office Box 2471
Baton Rouge, LA 70821
(504) 387-3221
Counsel for Monochem, Inc.

Burt Ballanfant*
Jose A. Berlanga
Post Office Box 2463
Houston, TX 77001
(713) 241-2233
Counsel for Shell Oil Company

William R. D'Armond*
KEAN, MILLER, HAWTHORNE, D'ARMOND, McCOWAN & JARMAN
Post Office Box 3513
Baton Rouge, LA 70821
(504) 387-0999
Counsel for Copolymer Rubber & Chemical Corporation

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY SIERRA CLUB'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED 3

SUMMARY OF ARGUMENT 3

I. The Decision Below Is Correct. Gwaltney Is Erroneous. 5

II. The Words "To Be in Violation" in 33 U.S.C. § 1365(a) Do Not Refer to Past Violations that Cease Prior to the Commencement of the Lawsuit. 9

A. Effluent Limitations Are Established on a Parameter by Parameter and Outfall by Outfall Basis. 9

B. "In Violation" Means an Ongoing Violation of an Effluent Limitation for a Particular Parameter at a Particular Outfall. 10

C. The CWA Legislative History Supports the Decision Below. 14

D. A Citizen's Authority to Enforce the Clean Water Act Is Not Coextensive With that of the Government. 20

E. The First and Fifth Circuits' Interpretation of the Words "In Violation" Is Required to Avoid Serious Constitutional Questions. 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 25

American Mining Congress v. Environmental Protection Agency, No. 85-1206 slip op. (D.C. Cir. July 31, 1987) 19

American Petroleum Institute v. Environmental Protection Agency, 661 F.2d 340 (5th Cir. 1981) 23

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 15

Anderson v. Liberty Lobby, Inc., — U.S. —, 106 S.Ct. 2505 (1986) 6

Baker v. Carr, 369 U.S. 186 (1962) 26

Burlington Northern Railroad Co. v. Oklahoma Tax Commission, — U.S. —, 107 S.Ct. 1855 (1987) ... 15

Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986), cert. granted, — U.S. —, 107 S.Ct. 872 (U.S. January 12, 1987) No. 86-473 ..... *passim*

Chrysler Corporation v. Brown, 441 U.S. 281 (1979) ... 18

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16, 18, 20

Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987) 18

E. I. du Pont de Nemours & Company v. Train, 430 U.S. 112 (1977) 18

TABLE OF AUTHORITIES—Continued

Page

Eagle-Picher Industries v. United States EPA, 759 F.2d 922 (D.C. Cir. 1985) 15

Environmental Protection Agency v. California Ex Rel. State Water Resources Control Board, 426 U.S. 200 (1976) 9

Environmental Protection Agency v. National Crushed Stone Association, 449 U.S. 64 (1980) 9

FAIC Securities, Inc. v. U.S., 768 F.2d 352 (D.C. Cir. 1985) 14

FMC Corporation v. Train, 539 F.2d 973 (4th Cir. 1976) 23

Friends of the Earth v. Consolidated Rail Corporation, 768 F.2d 57 (2d Cir. 1985) 12, 16

Garcia v. CECOS International, Inc., 761 F.2d 76 (1st Cir. 1985) 2

Garcia v. United States, 469 U.S. 70 (1984) 16

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 25

Hamker v. Diamond Shamrock Chemical Company, 756 F.2d 392 (5th Cir. 1985) 2, 3, 7, 14

I.N.S. v. Cardoza Fonseca, — U.S. —, 107 S.Ct. 1207 (1987) 15

Los Angeles v. Lyons, 461 U.S. 95 (1983) 25

Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253 (9th Cir. 1977) 22

Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981) 17, 26

Monterey Coal v. Federal Mine Safety and Health Review, 743 F.2d 589 (7th Cir. 1984) 16, 17

TABLE OF AUTHORITIES—Continued

Page

National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810 (1983) 19

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1974) 17

National Small Shipments v. Civil Aeronautics Board, 618 F.2d 819 (D.C. Cir. 1980) 15

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation, 807 F.2d 1089 (1st Cir. 1986), pet. for cert. filed (U.S. March 17, 1987) (No. 86-1562) ..... *passim*

Regan v. Wald, 468 U.S. 222 (1984) 15

Richards v. United States, 369 U.S. 1 (1962) 14

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980) 19

Rubin v. United States, 449 U.S. 424 (1981) 14

Sierra Club v. Shell Oil, 817 F.2d 1169 (5th Cir. 1987) ..... *passim*

Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977) 18

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 25

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 14

Tull v. United States, — U.S. —, 107 S.Ct. 1831 (1987) 21

United States Department of State v. Washington Post Co., 456 U.S. 595 (1982) 18

United States v. Locke, 471 U.S. 84 (1985) 14, 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Oregon, 366 U.S. 643 (1961) 14

United States v. Roger, 466 U.S. 475 (1984) 14

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 25

Walls v. Wastewater Resource Corporation, 761 F.2d 311 (6th Cir. 1985) 2

Warth v. Seldin, 422 U.S. 490 (1975) 25

Weyerhaeuser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 12

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981) 5

CONSTITUTION

U.S. Constitution, Article III 24

STATUTES

F.R.C.P. 12(b)(1) 5, 6

28 U.S.C. 1345 21

28 U.S.C. 1355 21

33 U.S.C. § 1319(a) 20, 21

33 U.S.C. § 1319(b) 20, 21

33 U.S.C. § 1319(d) 20, 21

33 U.S.C. § 1342 ..... 1, 9

33 U.S.C. § 1342(k) 9

33 U.S.C. § 1365 ..... 2, 8, 12, 21, 22

33 U.S.C. § 1365(a) 1, 5, 9

TABLE OF AUTHORITIES—Continued

Page

33 U.S.C. § 1365(a)(1) 10, 13, 16

33 U.S.C. § 1365(b) 2

33 U.S.C. § 1365(b)(1)(A) 10

42 U.S.C. § 7401 *et seq.* 17

REGULATIONS

40 C.F.R. § 122.41(l)(4)(i) 10, 13

40 C.F.R. § 122.41(l)(6) 10

40 C.F.R. § 122.41(l)(7) 10

40 C.F.R. § 122.44(l) 13

LEGISLATIVE HISTORIES

A Legislative History of the Clean Air Amendments of 1970 (1974) 17

A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) 14, 16, 17, 19

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Allied Corporation; Bercen, Inc.; Copolymer Rubber & Chemical Corporation; Formosa Plastics Corporation, Louisiana, Inc.; Monochem, Inc.; and Shell Oil Company, respectfully pray that the petition for a writ of certiorari herein be denied.

This Court has granted a writ in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, which presents nearly identical questions of law. The decision in that case will, in all likelihood, affect the future of these cases. Through this Opposition, Respondents seek to present their arguments as to why the decision by the Court of Appeals in *Gwaltney* was in error and as to why the petition herein should be denied.

STATEMENT OF THE CASE

In the action below, the Sierra Club appealed three separate judgments of two federal district courts dismissing the Sierra Club's "citizen suits" against the six Respondents for alleged violations of their NPDES (National Pollutant Discharge Elimination System) permits issued under the authority of the Clean Water Act (CWA), 33 U.S.C. Section 1342. Suits against five of the Respondents were dismissed for lack of subject matter jurisdiction, and the sixth suit was dismissed on summary judgment. The Court below [*Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987) Petitioners' Appendix at 1 (hereinafter "*Shell Oil*")] affirmed the district courts' dismissals, but not on jurisdictional grounds. Instead, it held that even if a plaintiff has properly alleged an ongoing violation for pur-

poses of the citizen suit provision, 33 U.S.C. Section 1365 (a), but, on summary judgment, fails to demonstrate a genuine factual issue as to whether a defendant is "in violation" when suit is filed, the plaintiff has failed to prove an essential element of its cause of action and the court should grant judgment on the merits.

As part of a nationwide campaign of citizen enforcement of the CWA, and after a scanty, generalized and out-of-date review, the Sierra Club sent Notices of Violation to more than twenty Louisiana industries, including the six Respondents. These Notices of Violation are required to be sent to the alleged violator, the State, and the Environmental Protection Agency (EPA), pursuant to 33 U.S.C. Section 1365(b), at least sixty (60) days prior to the commencement of any litigation. The purpose of the required 60-day notice is to allow EPA an opportunity to commence enforcement proceedings, if warranted, and to allow the discharger to come into compliance voluntarily and to thereby avoid the citizen action.[1]

Subsequent to the Notices of Violation, these suits were filed. During the pendency of these actions, the Fifth Circuit reached its decision in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). Based upon the *Hamker* decision, the defendants in the six cases challenged the district courts' jurisdiction over the Sierra Club's enforcement actions. In each case, the defendants submitted evidence to show that they did not commit any violations on the dates the suits were filed and that they were not "chronic episodic" violators within the meaning of Judge

---

[1] *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 396 (5th Cir. 1985); *Walls v. Wastewater Resource Corp.*, 761 F.2d 311, 316-317 (6th Cir. 1985); *Garcia v. CECOS International, Inc.*, 761 F.2d 76, 82 (1st Cir. 1985).

Williams' concurring opinion in *Hamker*. In each case, the district courts found that the Sierra Club failed to produce evidence that the defendants were "in violation."

On appeal, the Fifth Circuit upheld the dismissal of each of the cases and found that, 817 F.2d at 1173:

> "the uncontradicted evidence in these cases demonstrated only past, sporadic or largely unconnected permit violations by each of the appellees. Not only was none of the violations ongoing at the date Sierra Club filed suit in either a "chronic episodic" or actual sense, but Sierra Club never attempted to establish, and in fact eschewed the possibility that there might be any requirement of demonstrating the ongoing or chronic nature of such violations. Sierra Club's proof failed to comport with its pleadings."

———o———

REASONS WHY SIERRA CLUB'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Summary of Argument

The decision below and the decision in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation*, 807 F.2d 1089 (1st Cir. 1986) petition for cert filed (U.S. March 1987) no. 86-1562, (hereinafter *Pawtuxet Cove*) are consistent and do not conflict.[2] The decision below is in conflict with the de-

---

[2] Indeed, the court below cited *Pawtuxet Cove* with approval, *Shell Oil*, 817 F.2d at 1175, App. at 14, and in part relied upon it. The Sierra Club has mischaracterized the holding in *Pawtuxet Cove* in an attempt to find a conflict where none exists.

The holding in *Pawtuxet Cove* is that allegations in a complaint "indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently

(Continued on following page)

cision of the Fourth Circuit in *Chesapeake Bay Foundation & Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), cert granted — US —, 107 S.Ct. 872 (U.S. January 12, 1987) (No. 86-473) (hereinafter *Gwaltney*).

This Court will shortly hear argument in *Gwaltney*. If the *Gwaltney* decision is affirmed, the instant cases should

---

(Continued from previous page)

done with, that would not warrant one" are necessary for jurisdiction under the citizen suit provision. 807 F.2d at 1093-94. This holding is fully consistent with the holding of *Shell Oil*.

After finding jurisdiction, the *Shell Oil* court went on to consider whether, based on the undisputed facts, the defendants were entitled to summary judgment. This, the *Pawtuxet Cove* did not do because it had dismissed the citizen suit for lack of jurisdiction based on the allegations in the complaint.

In dicta, apparently relied upon by Sierra Club in order to create a conflict between the circuits, *Pawtuxet Cove* made the observation that, 807 F.2d at 1094:

> A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

By "judged objectively," the court clearly was referring to its directions to the district courts earlier in the same paragraph:

> In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations.

This is precisely the standard employed by the *Shell Oil* court in evaluating whether, based on the undisputed facts, there was a cause of action. All the *Pawtuxet Cove* dicta means is that it is possible that there may be jurisdiction, and there may be a cause of action, in a case where for a variety of reasons an injunction proves unobtainable. In that event, civil penalties may still be appropriate. This is an unexceptionable proposition, and nothing in *Shell Oil* is to the contrary. Certainly, the nonexistent conflict between *Shell Oil* and dicta in *Pawtuxet Cove* is not an adequate basis for a grant of a writ of certiorari.

be remanded to the Fifth Circuit for reconsideration in light of such decision. If the decision in *Gwaltney* is reversed, as we believe it should be, then this writ should be denied. Because of the central importance of *Gwaltney,* this Opposition will address many issues pertinent to the Court's consideration of *Gwaltney.* It is respectfully submitted that the decision in *Gwaltney,* holding that CWA citizen suits are available for solely past violations, is simply incorrect, as set forth in both *Pawtuxet Cove* and the decision below and for the reasons set forth in this opposition, infra.

I. The Decision Below Is Correct. Gwaltney Is Erroneous.

In its petition for certiorari, Sierra Club completely misstates the decision by the Fifth Circuit below by arguing that the Fifth Circuit opinion was based upon jurisdictional issues. In fact, as set forth in Section I of the Opinion, the Court's decision was based, not upon a lack of jurisdiction, but upon the merits. As stated by the Court, 817 F.2d at 1172:

> "Thus, '[w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.' *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981) . . . .
>
> As a result, when a plaintiff has alleged an ongoing violation for purposes of Section 1365(a), but he fails to demonstrate a fact issue about whether a defendant is 'in violation,' the court should grant summary judgment for the defendant on the merits under Fed.R.Civ.

> P. 56, instead of dismissing for want of jurisdiction under Fed.R.Civ.P. 12(b)(1) . . . .
>
> . . . Consequently, dismissing some of the cases for lack of jurisdiction was tantamount to summary judgment against Sierra Club on the merits of the critical issue of appellee's being 'in violation' when the actions were filed. No reversible error follows from this procedural flaw."

Holding that "in violation" is an essential part of the cause of action and thus "material" within the meaning of Rule 56, Federal Rules of Civil Procedure[3], the Fifth Circuit affirmed the district courts' dismissals because the Court concluded, after a careful and detailed factual review, that defendants were not "in violation" at the time the suits were filed and that there was no genuine issue as to this material fact. Thus, the decision below had nothing to do with jurisdiction, allegations in the complaint, good faith pleadings, or similar matters. Sierra Club just failed to demonstrate the existence of a genuine issue of material fact essential to its cause of action.

Well pleaded allegations in a complaint that a discharger is "in violation" may alone be sufficient to overcome a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of jurisdiction. However, as the *Shell Oil* court noted, that is simply not enough. A plaintiff must thereafter submit evidence that there is a material issue of fact as to whether the defendant is "in violation" when faced with a Rule 56 motion for summary judgment, or the equivalent. Failure to show the existence of this material fact issue results, as

---

[3]See *Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S.Ct. 2505 (1986).

it did in the cases below, with the dismissal of the suit; not for lack of jurisdiction, but because plaintiff failed to create a genuine issue regarding facts essential to its cause of action.

A comparison of the language used by the Courts in *Pawtuxet Cove, Shell Oil,* and the concurring opinion of Judge Williams in *Hamker* makes it clear that the tests for "in violation" are essentially identical in each. One need only to compare the injunction standards set forth in *Pawtuxet Cove,* the "chronic episodic violator" test defined by Judge Williams in his concurring opinion and the factual analysis and its application to the term "in violation" in *Shell Oil.* None would allow private enforcement actions to proceed where there were solely past violations. Each would require an analysis of the nature and cause of the violations and whether or not steps had been taken by the discharger to remedy the situation such that the likelihood of repetition of those violations was sufficiently great to warrant the relief.[4]

Under these analyses, if a discharger merely "turns off the spigot" without taking any steps to correct the underlying cause of the exceedences which make up the continuing violation, it is "reasonable to believe that mis-

---

[4]The record is replete with examples of why the Sierra Club was unable to prove that defendants were in violation "when suit was filed." For instance, Bercen, Inc. has not had any violations from any outfall listed in the complaint since October, 1984, over six months prior to suit being filed. Formosa Plastics had been issued a new permit before suit was filed which had significantly different effluent limitations than in the prior permit. Thus, there is no reasonable likelihood that its previous exceedences would continue. Copolymer tested 10,617 samples in the 12 months prior to suit, and found only 11 exceedences (some of which may not have been permit violations but excused upsets). Those 11 exceedences resulted from 7 separate and unrelated causes and not from any chronic problem.

conduct will continue and a citizen's suit may go forward." However, if the causes of the exceedence have been remedied, or the discharge was an isolated or infrequent event, or the problem was caused by equipment failure which was repaired, unusual weather or other similar unexpected causes, then it is not reasonable to believe that these "violations" will continue and a citizen suit is subject to dismissal. In the cases below, the facts, as found by the district courts and the Court of Appeals, simply do not support a cause of action under 33 U.S.C. § 1365.

If the facts are sufficient to authorize a court to issue an injunction against the chronic episodic or continuing violator at the time suit is filed (though an injunction may not be ultimately granted because the problem was corrected after suit was filed, or for equitable reasons, or otherwise), then civil penalties are available as an additional sanction for those violations, including those occurring prior to suit, which make up the continuing or renewed violations for which injunctive relief is available. That is the reasoning of the *Hamker* court, the *Pawtuxet Cove* court and the *Shell Oil* court.

The Sierra Club and the *Gwaltney* court have taken the extreme position—that citizen suits may be instituted and maintained for solely past violations. If solely past violations are sufficient to provide a citizen with a cause of action under 33 U.S.C. § 1365, then *each* exceedence of any permit limitation would form the basis for a suit no matter what the cause of the violation or whether it has been corrected, and no matter what the record of the discharger. Under this reasoning there could be a separate suit by different plaintiffs for each past violation. The result could be a massive burden on the federal courts and little, if any, improvement to the environment. Such a position is clearly unreasonable and unsupported by the statutory language.

The decision in *Shell Oil* below is consistent with the decision in *Pawtuxet Cove* and both are proper interpretations of the statutory language. The decision by the court in *Gwaltney* is simply wrong and inconsistent with the statutory language. Therefore, certiorari should be denied in the instant case and *Gwaltney* should be reversed.

II. The Words "To Be In Violation" In 33 U.S.C. § 365(a) Do Not Refer To Past Violations That Cease Prior To The Commencement Of The Lawsuit

A. Effluent Limitations Are Established on a Parameter by Parameter and Outfall by Outfall Basis

Effluent limitations, which are developed for an industrial category or subcategory, are transformed into limitations for an individual plant within the category or subcategory by incorporation into the terms and conditions of an NPDES permit issued to the discharger. 33 U.S.C. § 1342; *Environmental Protection Agency v. National Crushed Stone Association,* 449 U.S. 64, 70 (1980) (quoting *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205 (1976)). If a discharger is in compliance with the effluent limitations contained in its NPDES permit it is deemed to be in compliance with the CWA. 33 U.S.C. § 1342(k).

A single industrial facility may have numerous point sources of discharge. These "outfalls" may serve a single process unit or multiple units, single or multiple treatment facilities, or may only carry stormwater runoff. See *Shell Oil,* 817 F.2d at 1173. Due to the unique process and treatment arrangement at each plant, when incorporating effluent limitations into permits, EPA develops separate conditions for each pollutant at each outfall. This is necessarily so if effluent limitations are to be technology-based.

Also, because the treatment system for an outfall may be unrelated to the treatment system for any other outfall, an exceedence of a permit parameter (effluent limitation) at one outfall is not an exceedence of any parameter at another outfall even if the same pollutant is involved. Stated simply, when determining whether a permittee has violated an effluent limitation, one must look at each parameter at each outfall independently.[5]

B. "In Violation" Means an Ongoing Violation of an Effluent Limitation for a Particular Parameter at a Particular Outfall

Under *Shell Oil,* the role of the district court in determining whether the defendants are "in violation" is simple. The court first looks at the violations alleged in the 60-day notice letter [33 U.S.C. § 1365(b)(1)(A)] and the complaint. It then compares the violations alleged with the discharge monitoring reports ("DMRs")[6] and other written communications between the administrative agencies and the discharger[7], the documents in the agency

---

[5]This is supported by the very notices given by the Sierra Club in these cases. Each alleged violation is listed on an outfall by outfall and parameter by parameter basis.

[6]40 C.F.R. § 122.41(l)(4)(i).

[7]There are several other types of reports used by EPA to assist in this determination. For example, 40 C.F.R. § 122.41(l)(6) requires the permittee to orally report certain instances of noncompliance within 24 hours. The oral report must be followed by a written report which indicates the cause of the noncompliance, whether the noncompliance has been corrected and must include a description of measures planned to prevent a recurrence.

Other instances of noncompliance not falling with these categories must be reported on Noncompliance Reports (NCRs) at the same time the DMRs are submitted. The NCRs must also contain a description of the cause of the noncompliance, and whether it has been corrected, and measures planned to prevent a recurrence. 40 C.F.R. § 122.41(l)(7).

enforcement files, and the other relevant evidence, including the discharger's explanations of the violations and the actions taken to correct them. Once it has reviewed this information, the court then determines whether any of the violations listed in the notice letter and complaint are part of a pattern of violations of a particular parameter at a particular outfall which exists around the time suit was filed.

If there is such a pattern, and the discharger is unable to show that there has been a *bona fide* correction of the cause of those violations or the problem was otherwise remedied prior to suit being filed, then there is sufficient basis for the issuance of an order enforcing that particular permit limitation and for the award of appropriate civil penalties for those violations of that particular permit limitation which make up the pattern of violation. If there is not a *bona fide* correction of the discharge problem, then the discharger is not in compliance because it has not installed, properly operated and maintained the necessary control equipment to comply with the discharge parameters of its permit. If, however, there is no pattern of violations or the pattern is broken prior to suit being filed as a result of either a *bona fide* correction of the discharge problem, or the issuance of a new permit or other reason which indicates it is unlikely that there will be a recurrence of the previous pattern of violations, then there is no basis for a finding that the discharger is "in violation" and the judgment should issue for the discharger.

Sierra Club would argue that a variety of unrelated exceedences, involving different outfalls and different para-

meters and resulting from unrelated causes is sufficient to establish liability under 33 U.S.C. § 1365. This position ignores the fact that citizen suits are intended to address specific, not generalized violations. *Friends of the Earth v. Consolidated Rail Corporation,* 768 F.2d 57, 63 (2d Cir. 1985).

The argument that a permit is the equivalent of an effluent limitation merely begs the question of what is meant by "in violation." A permittee is "in violation" of its permit only if it is "in violation" of a condition in that permit. The ultimate determination of whether the permittee is "in violation" still depends upon whether there are unremedied problems such that future exceedences are likely. If *isolated and unrelated* exceedences make a permittee a "chronic episodic" or continuing violator, then practically all dischargers will be subject to citizen suits and the Congressional purpose that citizen suits serve as a tool to bring about abatement of ongoing violation would be lost.

The Sierra Club also misconstrues the careful consideration to the nature of the violations given by the Court of Appeals below as being "excuses" for those past violations. Petition at 22. The Court of Appeals in no way "excused" any past violations. Rather, it carefully evaluated those past violations to determine whether they could reasonably be construed to suggest an ongoing problem—that is, the Court sought to determine if the discharger was still "in violation" when the suit was filed.[8]

---

[8]Therefore, the claimed conflict with *Weyehaeuser v. Costle,* 590 F.2d 1011 (D.C. Cir. 1978) does not exist.

For example, the Court of Appeals noted that if permit limitations in existence when suit was filed were applied to past discharges then the number of violations of the no longer effective limitations[9] cited by Sierra Club would have been greatly reduced. "While the new permit had no retroactive effect," *Shell Oil*, 817 F.2d at 1174, n.5, App. at 11-12, n.5, the greatly reduced numbers of violations that would have occurred in the past had the new limitations been in effect demonstrates that those past violations did not suggest an ongoing problem. That is, the past violations, when considered in light of current permit limitations, did not support the Sierra Club's assertions that the discharger was "in violation."

The alternative interpretation of "in violation" pressed by the Sierra Club and relied upon by the Court of Appeals in *Gwaltney*—that citizen suits can be for solely past violations—ignores the plain language of the statute.[10] Straining to find ambiguity where there is none, *Gwaltney* relies on a false analogy to the tax laws to conclude that it is plausible to say that one is "in violation" and continues "in violation" by having once "violated." *Gwaltney*, 791 F.2d at 309, n. 10. As demonstrated by the court in *Pawtuxet Cove*, this argument analogy is "forced and the analogy inapt." 807 F.2d at 1092.

---

[9]The permit conditions referred to were changed by EPA because they were recognized as being unrealistic and overly stringent. *Shell Oil*, 817 F.2d at 1174, n.5, App. at 12, n.5. It should be recognized that EPA has very limited authority to liberalize an effluent limitation. See 40 C.F.R. § 122.44(l).

[10]Had Congress intended 33 U.S.C. § 1365(a)(1) to apply to persons beyond those who are presently "in violation," it would have easily been made to read "who is alleged to be, *or to have been*, in violation." See *Pawtuxet Cove*, 807 F.2d at 1092.

The interpretation set forth in the *Hamker, Sierra Club* and *Pawtuxet Cove* opinions is the only interpretation that is consistent with the language, legislative history, and structure of the Clean Water Act. Moreover, as shown below, this interpretation avoids serious constitutional problems involving the citizen suit provision that would arise if citizens were authorized to sue to collect civil penalties for violations that ceased prior to commencement of the lawsuit.

C. The CWA Legislative History Supports the Decision Below.

Courts assume that the legislative intent is expressed in the ordinary meaning of the words used in the statute.[11] *United States v. Locke,* 471 U.S. 84, 95 (1985); *United States v. Rodgers,* 466 U.S. 475, 479 (1984); *Richards v. United States,* 369 U.S. 1, 9 (1962). Hence, courts should refuse to consider the applicable legislative history when the statute is "plain and unambiguous on its face." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 187, n.33 (1978); *Rubin v. United States,* 449 U.S. 424, 430 (1981); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *FAIC Securities, Inc. v. United States,* 768 F.2d 352, 361-362 (D.C. Cir. 1985).

There can be no doubt that some courts have strayed from this rule of construction, but doing so entails the risk

---

[11]In fact, Senator Muskie, on whose statements the court in *Gwaltney* relied in reviewing the legislative history, stated that the Conference Committee had "tried . . . not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) p. 164 (hereinafter CWA Legis. Hist.).

that the lawmaking process will be compromised. This Court has recognized that reference to legislative history where the statute is clear "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan v. Wald*, 468 U.S. 222 (1984). See also *Eagle-Picher Industries v. EPA*, 759 F.2d 922, 929 n.11 (D.C. Cir. 1985). Dissatisfied legislators or interest groups can place in the legislative history statements which can later be used to influence the courts to interpret language to their favor, but contrary to the intent of Congress as a whole. See *National Small Shipments v. Civil Aeronautics Board*, 618 F.2d 819, 828 (D.C. Cir. 1980).

Even though the plain language of the statute appears to settle the question of what Congress meant by "in violation," if the Court desires to look to the legislative history, it should do so only to determine "whether there is 'clearly expressed legislative intention' contrary to the language, which would require us to question the strong assumption that Congress expresses its intent through the language it chooses." *I.N.S. v. Cardoza Fonseca*, — U.S. —, 107 S.Ct. 1207, 1213, n.12 (1987). See *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, — U.S. —, 107 S.Ct. 1855, 1859-60 (1987). This is a step to be taken cautiously. *U.S. v. Locke*, supra, 471 U.S. at 96 quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982).

Where the statutory language is clear, the party wishing to alter the clear meaning by using legislative history bears a great burden. "(T)he plainer the statutory lan-

guage, the more explicit, convincing and reliable the contrary legislative history must be to persuade a court to follow the indications in the legislative history." *Monterey Coal v. Federal Mine Safety & Health Review*, 743 F.2d 589, 595 (7th Cir. 1984). See also *Garcia v. United States*, 105 S.Ct. 479, 482-83 (1984); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985). As will be shown below, the legislative history of § 1365(a)(1) not only fails to rebut the clear language of the statute, but convincingly supports the literal interpretation of the statute.

The legislative history of the CWA makes it clear that Congress' intent was to limit citizen suits to actions seeking to "*abate*" an ongoing violation. Committee reports from both the House and the Senate, as well as excerpts from the Senate debate on the bill, expressly refer to the citizen suit provision as providing a cause of action to *abate* violations, with injunctions and civil penalties available as remedies to achieve the abatement.[12]

---

[12] The Senate Committee Report, in reviewing Section 505, refers to *abatement* as the goal of the citizen suit, and does not mention past violations as a basis for suit. In the discussion of the intent of Section 505(a)(1), the Report mentions "abatement" numerous times: "if the agency had not initiated *abatement* proceedings . . . the citizen might choose to file the action." (CWA Legis. Hist. p. 1498). "Whether *abatement* is sought by an agency or by a citizen. . ." (*Id.* at 1498). "None of these points (concerning class actions) is appropriate in citizens suits seeking *abatement* of violations. . ." (*Id.* at 1499). "This should extend (award of costs and fees) to plaintiffs in actions which result in successful *abatement* but do not reach a verdict." (*Id.* at 1499).

(Continued on following page)

Further indications of Congress' intent in Section 505 of the CWA can be found in the legislative history of the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.* The citizen suit provision of the CAA served as the guide for the citizen suit language of the CWA. *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S. 1, 17 n.27 (1981); *Natural Resources Defense Council v. Train,* 510 F.2d 692, 699 (D.C. Cir. 1974); CWA Legis. Hist. at pp. 820 and 1497. The CWA added the additional remedy of civil penalties, but did not change the "alleged to be in violation" language of the CAA citizen suit provision. As does the history of the CWA, the CAA's legislative history emphasizes that the purpose of the citizen suit provision is to *abate* violations and not to permit actions against violations that are not ongoing.[13]

(Continued on following page)

The Conference Committee adopted the Senate provision, except to recommend two changes to Section 505 unrelated to "in violation". The lack of attention to this issue is indicative that Congressional intent is properly represented by the clear language of the statute. *Monterey Coal,* supra, 743 F.2d at 598.

[13](i) The Clean Air Act Conference Committee Report states: "The conference agreement authorizes citizen suits against polluters to *abate* violations. . . This should extend to plaintiffs in actions which result in successful *abatement*. . ." A Legislative History of the Clean Air Amendments of 1970 (1974) p. 136 (hereinafter CAA Legis. Hist.).

(ii) The Statement of the Managers on the Part of the House (on the Conference results) states: "The House bill did not include a provision for citizen suits. The Senate amendment authorized citizen suits against violators . . . to seek *abatement* of such violations." (CAA Legis. Hist. p. 205).

(iii) The Senate Report discussion of intent uses the *identical* language found in the Clean Water Act Senate Report, clearly referring to the citizen suit provision as on seeking *abatement* of violations. Compare the CWA Legis. Hist. at p. 497, with CAA Legis. Hist. at p. 437.

In its attempt to alter the clear language of the statute, the *Gwaltney* court cites principally two of Senator Muskie's comments upon presentation of the Conference Committee Report to the Senate. These excerpts fall far short of the required "explicit, convincing and reliable" type of legislative history needed to alter clear, unambiguous statutory language.

Even though Muskie is considered as "perhaps the Act's primary author," *E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 129 (1977), his statements do not represent any formal report concurred in by other members of Congress, but are only his personal comments. The statements of a single legislator, even the sponsor of a provision, are not controlling in analyzing the legislative history.[14] *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 118 (1980); *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979); *Dubois v. Thomas,* 820 F.2d 943, 947 (8th Cir. 1987). *cf. United States Department of State v. Washington Post Co.,* 456 U.S. 595, 600-601 (1982). ("Passing references and isolated phrases are not controlling when analyzing a legislative history . . . . [T]here surely would be clear suggestions in the legislative

---

[14]Both the Fifth and Eighth circuits in other cases have found Senator Muskie's statements interpreting the CWA to be contrary to the intent of Congress. In the first sentence of the same paragraph of his oral statement in which he says that citizens can file suit against one alleged "to have been" in violation, Senator Muskie stated that the Administrator had a non-discretionary duty to issue an abatement order whenever an NPDES permit violation occurred. (CWA Legis. Hist. at p. 163). The Fifth and Eighth Circuits have since ruled that the intent of Congress was that the issuance of such orders be discretionary. *Sierra Club v. Train,* 557 F.2d 485 (5th Cir. 1977); *Dubois v. Thomas,* 820 F.2d 943 (8th Cir. 1987).

history" if a meaning other than the normal meaning of the word were intended).

Additionally, the circumstances of the delivery of Muskie's statements weaken their weight. His only statement regarding solely past violations was never actually spoken to the Senate but is found in a written statement entered into the record as an addendum to his spoken comments.[15] His oral remarks were substantially less favorable for the Sierra Club position as they indicated that a citizen suit may be based upon only "continuous and intermittent" violations.[16] The House, which voted on the final bill the same day that Muskie made his statement to the Senate, did not have the opportunity to hear the remarks or read the statement entered into the Congressional record. As such, his statement is of limited weight. See, e.g., *National Association of Greeting Card Publishers v. United States Postal Service,* 462 U.S. 810, 832 n.28 (1983).

The Sierra Club also argues that recent legislative statements and amendments to the CWA support its position. Such statements and legislative history are of questionable worth. "What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment." *Rogers v. Frito-Lay, Inc.,* 611 F.2d 1074, 1080 (5th Cir. 1980); see *American Mining Congress v. EPA,* slip op., Dkt. No. 85-1206 (D.C. Cir. July 31, 1987),

---

[15]See CWA Legis. Hist. pp. 163-164, 179.

[16]CWA Legis. Hist. p. 163. "Intermittent" indicates a substantial degree of regularity and continuity in the specific violations.

Lexis at 19; "Subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 447 U.S. at 118 n.13. Therefore, the recent amendments to the CWA are entitled to little, if any, weight in evaluating Congress' intent in passing the prior legislation.

Moreover, the legislative history of the Water Quality Act of 1987 relied on by the Sierra Club does not support its strained interpretation of "in violation." It is clear that Congress believes that the *government* can seek relief for purely past violations of a permit condition, but as shown below, a *citizen's* authority to seek relief under the citizen suit provision is not coextensive with the government's authority to enforce civil penalties.

The Sierra Club and the *Gwaltney* court have failed to show that the legislative intent differs from the clear statutory language. *Gwaltney* should be reversed and certiorari denied in this case.

D. A Citizen's Authority to Enforce the Clean Water Act Is Not Coextensive with that of the Government.

The Sierra Club and the *Gwaltney* court argue that citizen enforcement authority under the CWA is coextensive with that of the government. Their reasoning is that the government is empowered to enforce the CWA, including the civil penalty provision (§ 1319(d)), by § 1319(b), which in turn incorporates the standard of § 1319(a), which authorizes the government to institute an enforcement action against anyone "in violation of any condition or limita-

tion . . ." *See* Petition at 16, *see also Gwaltney,* 791 F.2d at 309.

The Sierra Club's and *Gwaltney's* reliance on Section 1319(d) is totally misplaced. As pointed out by this court in *Tull v. United States,* — U.S. —, 107 S.Ct. 1831, 1839 (1987):

> Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead, each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties.

That is, the language of subsections 1319(a) and 1319(b) refers only to *injunctive* relief and administrative compliance orders, and that language does not provide the jurisdictional basis for governmental enforcement of civil penalties. On this issue, even the government, which supports affirmance of *Gwaltney* for factual reasons, agrees with our position and points out in its Amicus brief in *Gwaltney* at 20-21 that jurisdiction for the government to enforce the civil penalty provision, Section 1319(d), is provided by 28 U.S.C. 1345 and 1355.

By contrast, the citizen suit provision is the sole authority for a citizen to seek an injunction or civil penalties. As compellingly stated by the Government, "[t]he marked divergence between the language of Section 309 [Section 1319] and that of Section 505 [Section 1365] persuasively demonstrates that Congress gave the government—but not private citizens—the power to seek civil penalties for wholly past violations." Brief for the United States at 21, n.33.

That citizen enforcement is not coextensive with government enforcement authority is also shown by the requirements of § 1365 that the plaintiff be adversely affected, that the plaintiff has given the required sixty day prior notice of the alleged violation, and that the citizen be precluded from commencing suit if EPA or the State already commenced a suit to require compliance.[17]

The Sierra Club is concerned that preventing citizen groups from suing for penalties for solely past violations will impair the uniformity of the enforcement scheme that Congress sought to create under the CWA. Just the opposite is the case. Congress intended for EPA to be the primary enforcer of the CWA because EPA has substantial expertise in judging compliance with water pollution control effluent limitations. This expertise allows EPA to recognize that the mere existence of occasional exceedences of a permit limitation does not necessarily represent a pattern of violations.

All of the NPDES permits involved in the six cases in this matter were written to achieve the level of pollution control achievable through application of best practicable control technology currently available ("BPT"). The method utilized by EPA for establishing these BPT permit effluent limitations was to look at the performance of the best performing pollution control technology. As described by the court in *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253, 1266 (9th Cir. 1977):

---

[17]Thus, the citizen suit provision was not intended to displace the role of government enforcement, but rather to ensure that people being adversely affected by violations of a permit could obtain relief through the courts if the discharger failed to remedy the violations or if the government failed to take enforcement action.

> In computing a standard based on a "confidence interval" of, say, 99%, the EPA determines a mg/l standard that the effluent discharge data from an exemplary plant can be expected to fall inside of 99% of the time.

Typical "confidence intervals" were 99% for daily maximum effluent limitations and 95-97% for daily or monthly average effluent limitations.[18]

As recognized in *American Petroleum Institute v. Environmental Protection Agency,* 661 F.2d 340, 350 (5th Cir. 1981), BPT presumes occasional exceedences:

> The record proves that upsets and bypasses are as much a part of BPT as modern equipment and technological data. Despite best efforts at compliance, even a facility employing the best available equipment will occasionally exceed discharge limitations.

See also *FMC Corporation v. Train,* 539 F.2d 973, 986 (4th Cir. 1976).

Thus, EPA would *expect* even the best available system to be in violation of the standards some percentage of the time. Therefore, a plant that occasionally fails to meet a given standard is performing as well as EPA expects under BPT technology. Thus, while permits on their face require 100% compliance, the courts have held that 100% compliance cannot be achieved and is not expected.

---

[18]These confidence intervals are for each pollutant being limited, thus are applicable to each parameter at each outfall and not for the overall performance for every parameter at all outfalls. Contrary to the representations of Petitioners' counsel, the *Shell Oil* decision did not approve a 95% compliance standard for NPDES permits. The Fifth Circuit simply emphasized that a review of the companies' compliance records only demonstrated the presence of "occasional" exceedences and not continuing violations. *Shell Oil,* 817 F.2d at 1173-1174, App. pp. 11-12. Sierra Club's "arsenic violation" analogy (Petition at p. 24, n.17) is thus completely misleading and erroneous.

EPA can use its expertise and discretion in deciding whether or not to prosecute a company which might exceed a permit limitation, keeping in mind that occasional exceedences of permit limitations in the past do not necessarily constitute an ongoing violation, but rather reflect the method the EPA employed in determining effluent limitations and the limitations of control technology and measurement techniques. Citizen groups on the other hand, do not bring this same expertise to focus in determining whether a violation has occurred. The statutory language limiting citizen suits to cases in which the defendant is alleged "to be in violation" of an effluent limitation, therefore, plays a role similar to EPA's prosecutorial discretion.

E. The First and Fifth Circuits' Interpretation of the Words "In Violation" Is Required to Avoid Serious Constitutional Questions.

The First and Fifth Circuits' interpretation of the words "in violation" is required to avoid serious questions about the constitutionality of the Citizen Suit provision. The Sierra Club and *Gwaltney* interpretation that these words permit a suit for civil penalties payable to the United States Treasury for violations that have ceased prior to the filing of a complaint would render the citizen suit provision of dubious constitutionality under the standing requirements of Article III.

The question of whether a plaintiff has standing involves both constitutional and prudential limitations. While Congress may, by legislation, expand standing to the full extent permitted by Article III,[19] "(i)n no event, however,

---

[19]For purposes of discussion, we will assume that Congress intended to expand standing to the full extent permitted by the Constitution.

may Congress abrogate the Art. III minima . . .'' *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979). The Article III constitutional limitations on standing involve three separate but related components: 1) There must be a ''distinct and palpable'' injury to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), rather than an alleged injury which is ''abstract,'' ''conjectural,'' or ''hypothetical,'' *Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983). 2) The injury ''must be 'fairly' traceable to the challenged action.'' *Allen v. Wright,* 468 U.S. 737, 751 (1984). 3) There must be a ''substantial likelihood'' that the relief requested will redress or prevent the injury. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

Here, we will focus on the redressability requirement. The question is whether any relief allowed under the citizen suit provision can redress or prevent injury to the Sierra Club or its members fairly traceable to the challenged action of a discharger who has ceased being ''in violation'' by the time suit is filed.

It is clear that the citizen suit provision can provide two types of remedy—injunctive relief ''to enforce such an effluent standard or limitation'' and civil penalties payable

to the U.S. Treasury. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 n.25 (1981). Neither of these types of relief can possibly redress or prevent any injury caused by violations of effluent standards or limitations which have already ceased when suit is brought.[20]

The plaintiffs could be made whole for any injury caused by violations in the past by damages payable to them; but damages are not available under the citizen suit provision. If the discharger is in violation when suit is filed, the plaintiff would have standing to seek an injunction and civil penalties payable to the Treasury because of the concrete threat of resumed violations. But the Sierra Club and the *Gwaltney* court would allow actions to be brought even where the violations have been remedied.

---

[20]If the violations were ongoing, injunctive relief obviously would provide relief and would easily meet the redressability requirement. We also believe that civil penalties payable only to the U.S. Treasury for ongoing violations would meet the redressability requirement—even when the magnitude of those penalties is determined, in part, by the number of violations in the past. That the violations are ongoing would give the plaintiffs a personal stake in the outcome of the litigation, and the existence of a personal stake is the essence of the standing requirement. *See Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, civil penalties are available for past violations when—and only when—those past violations are part of the ongoing violations of the particular effluent limitation.

---o---

CONCLUSION

For the reasons set out above, this Court should deny the writ requested.

Respectfully submitted,

Frank S. Craig, III*
BREAZEALE, SACHSE & WILSON
Post Office Box 3197
Baton Rouge, LA 70821-3197
(504) 387-4000
Counsel for Allied Corporation, Bercen, Inc. and Formosa Plastics Corporation, Louisiana, Inc.

Robert S. Taylor*
SWIDLER & BERLIN, Chartered
3000 K St. NW, Suite 300
Washington, DC 20007
(202) 944-4320
Counsel for Allied Corporation

Tom F. Phillips*
TAYLOR, PORTER, BROOKS & PHILLIPS
Post Office Box 2471
Baton Rouge, LA 70821
(504) 387-3221
Counsel for Monochem, Inc.

Burt Ballanfant*
Jose A. Berlanga
Post Office Box 2463
Houston, TX 77001
(713) 241-2233
Counsel for Shell Oil Company

William R. D'Armond *
KEAN, MILLER, HAWTHORNE, D'ARMOND, McCOWAN & JARMAN
Post Office Box 3513
Baton Rouge, LA 70821
(504) 387-0999
Counsel for Copolymer Rubber & Chemical Corporation

* Counsel of Record